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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 290

PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS; MRS. MINNIE EVANS, Whose Indian Name Is MINNIE WESHKEENOO; JOHN P. WAH-WASSUCK; ALFRED CURTIS PEQUANA; JAMES P. WAHBNOSAH and WILLIAM HALE,
Petitioners,

vs.

STEWART L. UDALL, Secretary of Interior; PHILLEO NASH, Commissioner of Indian Affairs, and BUFORD MORRISON, Area Field Representative.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners,

vs.

STEWART L. UDALL, Secretary of Interior; PHILLEO NASH, Commissioner of Indian Affairs, and BUFORD MORRISON, Area Field Representative.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 24, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 82-88) printed in Appendix B hereto, infra, p. A2.

The opinion of the Circuit Court of Appeals printed in Appendix C hereto, infra, p. A11 is reported in ..... F.2d .....

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1966, p. A11, infra. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1361, §1353 and §1331.

QUESTION PRESENTED

Does the said court have jurisdiction to determine the right of petitioners to require officers of the government to distribute a court award to them.

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C.A. §1361, §1353 and §1331. They are printed in Appendix A, infra, p. A1.

STATEMENT

Petitioners bring this action as an identifiable group of the Pottawatomie Nation which group was in existence on June 5, 17, 1846, and petitioners further appear as Tribal Councillors and as the Tribal Claims Committee and as individual party plaintiffs. The said court has jurisdiction of this case based on 28 U.S.C.A. §1361, §1353 and §1331. which statutes gave jurisdiction to the United States Courts to determine an issue as here presented and to compel the United States through its officers or employees to perform their duty toward petitioners.

The petitioners were selected by the Prairie Band of the Pottawatomie Nation to pursue claims against the government and to pursue the instant case both as reflected by the Indian Claims Commission award (R. 7, 91, 94) and affidavits which were attached to the Record on Appeal to the Circuit.

The Indian Claims Commission award provided that the Pottawatomie Nation, of which the Prairie Band was a part, was to receive the award for the benefit of all descendants of said nation as the nation was constituted and recognized in 1846. Subsequent to the Indian Claims Commission award, congress authorized the use of appropriated funds to pay the descendants of the Pottawatomie Nation as that nation was created and recognized by the treaty of 1846.

After the Indian Claims Commission award and the congressional appropriation the defendants approved a distribution of the awarded funds contrary to the Indian Claims Commission award and contrary to the direction of the congressional appropriation.

The defendants had provided and approved a method of distribution based on allottees and their descendants and not on the basis of the Prairie Band Pottawatomie Nation as created and recognized by the treaty of 1846 nor on the descendants of said nation as it was constituted and recognized in said treaty. The defendants provided and approved a method of entitlement on a per capita basis with eligibility to be determined on the basis of allottees and descendants of allottees.

The defendants filed a motion for summary judgment stating that the said court had no jurisdiction to determine the issues presented by petitioners.

The District Court sustained the motion for summary judgment. Appendix B, p. A2. The United States Court of Appeals for the Tenth Circuit sustained the District Court. Appendix C, infra, p. A11. The said court has jurisdiction to determine and provide relief for petitioners.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has held 28 U.S.C.A., §1361 to not apply in requiring an officer or employee of the government to perform their function or their duty toward the petitioners in this case. The petitioners are a part of an almost extinct nation. Petitioners represent a group designated as the descendants of a certain treaty (1846). The lower courts' decisions prevents these petitioners from coming before a judiciary tribunal for the determination of a legal issue. The lower courts exclude petitioners and all others who may be in similar circumstances from presenting the issue of law and equity before a proper forum and in essence the United States through its courts has again deprived the Indian of their just determinations.

2. The lower courts' decisions have given an unwarranted construction to the jurisdiction statute urged by petitioners and the lower courts have imposed upon petitioners definition of inferiority which precludes justiciable decisions in contrast to their more worthy white brothers.

3. The lower courts have permitted, sanctioned, advocated, condoned and promoted exclusion of justice by the method of administrative agencies and excluded judicial, legal and equitable determinations by the courts. The instant case is an example of administrative supremacy under judicial determination, the result of which has enabled administrative czars to abuse administrational and discretionary issues without governmental supervision.

4. The Indian Claims Commission award and the congressional appropriations have both provided that the distribution of these funds in excess of $3,000,000.00 should be made to the descendants of the treaty whose forefathers had been cheated by the government. The defendants, whimsically not approving of this award or congressional appropriation, have provided and approved of another definable group to receive the appropriation. This group has been labeled by the defendants as the proper recipients of the money. Congress has entrusted to the executives of our government the fair distribution to the proper definable group. The executives of our government have once again engaged the Indian to a defeat and prevented his rightful receipt by the distribution of these funds to others than who should receive them.

5. Circuit Courts have held that judgment belongs to descendants of those affected by the inequitable treaties and that such defendants are identifiable groups who should receive awards such as in the instant case. *Minnesota Chippewa Tribe* v. *U. S.*, 315 F.2d 90

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

.....

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APPENDIX A—STATUTES

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

§ 1353. Indian allotments.

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency. June 25, 1948, c. 646, 62 Stat. 934.

§ 1331. Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS; MRS. MINNIE EVANS, Whose Indian Name Is MINNIE WESHKEENOO; JOHN P. WAHWASSUCK; ALFRED CURTIS PEQUANA; JAMES P. WABNOSAH and WILLIAM HALE,

Plaintiffs,

vs.

STEWART L. UDALL, Secretary of the Interior; PHILLEO NASH, Commissioner of Indian Affairs, and BURFORD MORRISON, Area Field Representative,

Defendants.

Civil No. T-3412

Memorandum of Decision

(Filed in the United States District Court for the District of Kansas, November 6, 1964. Charles W. Cahill, Clerk. By /s/ L. Bernice Lutes, Deputy.)

Plaintiffs maintain this action, according to the allegations of their complaint as the Tribal Councillors and Tribal Claims Committee of the Prairie Band of Pottawatomie Indians and also individually as individual party plaintiffs.

The action is brought as a proceeding in the nature of a declaratory judgment and for an injunction pursuant to the U.S. Code and F.R.C.P.

Jurisdiction is allegedly based on 28 U.S.C. §1361, and the alleged purpose of the action is to compel defendants to perform their duty to plaintiffs, and to determine the

identity of the Indians who are entitled to the Congressional funds appropriated to cover awards and judgment made in favor of the Prairie Band and the Citizens Band of Pottawatomie Indians.

Plaintiffs assert that persons claiming to be the governing authorities of the Prairie Band have furnished the defendant Secretary of the Interior a procedure for determining the identity of the persons who are entitled to the award and judgment and the appropriated funds to satisfy the award and judgment and that the proposed procedure submitted and which has now been adopted and approved, is contrary to the provisions of the Act of Congress which appropriated the funds to satisfy the awards and judgments in favor of the Indian tribe. Plaintiffs further contend that the procedure as prescribed, recommended and approved by defendants is contrary to the awards, and if followed will permit hundreds of people who are not in fact eligible, to participate in the distribution of the appropriation, and plaintiffs will be irreparably damaged and injured.

Plaintiffs seek to enjoin defendants from proceeding further with the method of distribution which defendants propose to use and to have the Court determine the rights of the parties in the appropriated funds.

Defendants have filed a motion for summary judgment for dismissal of the complaint on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. The controversy in this proceeding arises from language contained in the final decree of the Indian Claims Commission, Dockets No. 15-J and 71-A, dated February 26, 1959, 7 Ind. Cl.Com. 186.1 which reads:

"That the Pottawatomie Nation, as created by the treaty of June 5, 17, 1846, as it then existed, have and recover of and from the defendant (The United States of America) for the benefit of all descendents of members of said nation as it was constituted and recognized by the United States in said treaty, the sum of $3,288,974.90."

It should be initially observed that this award was made to the Indian Tribe and not to individuals. Nor had the Claims Commission any authority to make an award otherwise than to the Tribal entity (25 U.S.C. 70a).

25 U.S.C. 70i provides that:

"Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

It appears in this case, a tribal organization exists and that it has been recognized by the Secretary of Interior as having authority to represent the tribe. Furthermore the recognized tribal organization has successfully presented a claim, and no fraud, collusion or laches on the part of the organization is alleged.[1] Since the jurisdiction of the Commission is restricted, the awards made by it for which Congressional appropriations were made must be considered with that limitation in mind.

The award made by the Indian Claims Commission is clearly to the tribal entity, yet even then, it does not bene-

1. *Minnesota Tribe* v. *U. S.*, 315 F.2d 906, 913.

fit the tribe unless implemented by an Act of Congress appropriating the funds to satisfy the judgment. Congress, it must be recognized, has the exclusive power to determine how these awards shall be distributed and to prescribe how the fund shall be expended or distributed.

Congress exercised its power and authority and directed (Pub. Law 87-205, 75 Stat. 474) that

> "the funds . . . after payment of attorneys fees and expenses, may be advanced or expended for any purpose that is authorized by the respective tribal governing bodies and approved by the Secretary of Interior."

The governing body of the tribe then adopted a resolution, Prairie Pott. 2-61, directing that $5000 be set aside to pay expenses involved in preparing a roll of persons entitled to share in the distribution of the fund awarded on a per capita basis and whose eligibility is established in accordance with resolution Prairie Pott. 1-61 adopted on September 24, 1960. This resolution, as amended, was approved by the Commissioner of Indian Affairs, acting for the Secretary of Interior.

The Court is asked to restrain the Secretary of Interior from making distribution to those persons placed on the rolls under procedure adopted by the governing body of the tribe and approved by the Department.

Is this action maintained by the legally constituted and recognized governing body of the Prairie Band?

It appears from uncontroverted exhibits before the Court that this action insofar as it is maintained for the Prairie Band of the Pottawatomie Tribe of Indians is brought by plaintiffs as the Tribal Councillors and Tribal Claims Committee of the Prairie Band.

In 1931, members of the tribe made inquiry of the Commissioner of Indian Affairs seeking to know whether any means existed by which a tribal business committee might be formed to investigate and present claims against the United States. They were advised that there was no approved governing body of the tribe at the time but that the Bureau would consider preparing a draft of suitable governing rules. Superintendant Baldwin was advised to prepare a document and he did so, thereafter meeting with a business committee elected by the tribe at which time the drafted document was approved by the business committee and forwarded to Washington where it was approved. The document was thereafter known as the "Baldwin Constitution." This Constitution and the Business Committee elected under it were re-affirmed when the Bureau recognized the Committee and the "Baldwin Constitution" on March 11, 1933. The "Baldwin Constitution" was amended at a referendum election held by the Prairie Band on October 8, 1960. This amendment was confirmed and approved by the Commissioner on January 17, 1961. The Business Committee or Tribal Councillors that were elected in accordance with the "Baldwin Constitution" and those elected pursuant to the revised Constitution, have been recognized by the Bureau as constituting the governing bodies of the Prairie Band.

The "Baldwin Constitution" contained no specific provision for membership and no membership roll was maintained under it, but a membership section was included in the revised tribal constitution approved January 17, 1961. By appropriate resolutions, the General Council of the tribe authorized the business committee to establish the roll for the distribution of the appropriation.

The authority to determine the membership of a Tribe or a Band of Indians rests with the tribal officials,

subject to the approval of the Secretary of the Interior where distribution of property held by the United States is concerned. Courts will not interfere in tribal Indian affairs and an action may not be maintained in this Court to control tribal action by suing the Secretary of the Interior rather than tribal officials.

> "Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their borders they have their own government, laws and courts, and are not subject to the laws of the state in which they are located or to the laws of the United States, except where federal laws are made applicable by Congressional enactment, and that federal courts are without jurisdiction unless jurisdiction is expressly conferred by Congressional enactment."[2]

So here, this action is an attempt on the part of the plaintiffs to assert rights in tribal property. But this is a matter subject to plenary power of Congress and not to judicial administration.[3] Plaintiffs make a strong case in support of their contention that many persons who are not Indians will benefit from the distribution of the appropriated funds as authorized by the plan submitted by the governing body of the Tribe and approved by the Secretary of the Interior. Inequitable as this might appear to be, jurisdiction to determine the membership in an Indian Band for the purpose of determining who would share in the tribal property is a matter for the determination of Congress in its Congressional acts, or by appropriate action taken by the Tribe, but in no event is it a matter that can be inquired into by the Courts. It is a political rather than a judicial problem.[4]

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2. *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131.
3. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294.
4. *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915.

In this case the Tribe through tribal action had complete authority to determine its own membership with the exception that where the distribution of tribal funds or other properties is concerned, its action is subject to the approval by the Secretary of Interior pursuant to 25 U.S.C. 163. It does not appear to the Court that there is any express legislation contained in the appropriation Acts passed by the Congress to the contrary.

The Secretary of the Interior approved the plan of the governing body of the Prairie Band submitted for the purpose of providing for the expenditure and distribution of the Indian Claims Commission's awards for which Congressional appropriations were made. This power exercised by the Secretary was vested in him by Congress, and determination of the membership of a Tribe for the purpose of distributing tribal assets is political and not judicial in nature. The Courts do not have jurisdiction to establish eligibility requirements which might be more favorable to the plaintiffs than those proposed by the tribal governing body and recognized and approved by the Secretary of the Interior. It is a matter which is subject to the complete control of Congress.[5] Since it does not affirmatively appear in the record that this Court has been conferred jurisdiction over the administration of tribal property by Congress, it does not have jurisdiction over the subject matter of the litigation. Neither does the Court have jurisdiction to grant the plaintiffs the relief they seek, which is, or appears to be plaintiffs' demand for a greater participation in the tribal funds that are to be distributed. The Court is of the opinion that jurisdiction does not exist under Title 28 U.S.C.A. §1353 for the reasons set forth in the decision of this Court in the case of Prairie Band of Pottawatomie Indians v.

5. *United States* v. *Chapman*, 190 F.2d 666.

Puckkee, et al., Case No. T-2894, entered September 24, 1962, Aff. 321 F.2d 767.

Are there indispensable parties not joined in this action?

The funds in litigation referred to in plaintiffs' complaint are on deposit in the Treasury of the United States. Such being the case the United States is an indispensable party to the action.[6] In the Osage Tribe case it was decided that funds of Indian Tribes held by the United States are held by the United States as a Trustee of the funds in question, and in suits touching the proper execution of a trust, the Trustee is an "indispensable party". Conversely the Prairie Band as beneficial owner of the funds held by the United States is likewise an indispensable party. Since the Tribe has an interest in the property in controversy and a final decree cannot be made without affecting that interest or leaving the controversy in such condition that its final termination would not be conclusive, it must be held that the interest of the Prairie Band in the tribal funds is not separable from the interest claimed by the plaintiffs.[7] It does not appear in the record that consent has ever been given by Congress which would permit plaintiffs to maintain in an action such as the one brought here against the United States. In the absence of such authorization the United States is not subject to suit in this Court.[8]

Defendants contend that plaintiffs, having invoked an administrative remedy provided in the procedure established by the Prairie Band and the Secretary of the Interior, cannot now be heard before this Court to maintain

6. *Osage Tribe* v. *Ickes*, 45 F. Supp. 179.
7. *State of Washington* v. *United States*, 87 F.2d 421.
8. *Sherwood* v. *United States*, 312 U.S. 584.

the present action without having exhausted their administrative remedies. The Court does not pass upon this contention in view of what has already been said.

The Court therefore determines that the complaint does fail to state a claim upon which relief can be granted; that the Court does not have jurisdiction of the subject matter of this action, or jurisdiction to grant the relief in question; that the action is not brought under the authority of the Prairie Band of Pottawatomie Tribe of Indians; that the individual plaintiffs do not have such an interest in the tribal funds as to enable them to maintain the action and the Prairie Band of Pottawatomie Indians and the United States are indispensable parties to this action and cannot be joined without the consent of Congress.

For these reasons the motion of the defendants for summary judgment must be sustained. Counsel for the defendants shall prepare and submit the appropriate order.

DATED at Topeka, Kansas this 6th day of November, 1964.

/s/ George Templar
United States District Judge

APPENDIX C

United States Court of Appeals

TENTH CIRCUIT

JANUARY TERM, 1966

PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS; MRS. MINNIE EVANS, Whose Indian Name Is MINNIE WESHKEENOO; JOHN P. WAHWASSUCK; ALFRED CURTIS PEQUANA; JAMES P. WAHBNOSAH and WILLIAM HALE,

Appellants,

vs.

STEWART L. UDALL, Secretary of Interior; PHILLEO NASH, Commissioner of Indian Affairs, and BUFORD MORRISON, Area Field Representative,

Appellees.

Number 8129

Appeal from the United States District Court for the District of Kansas

(Filed in the United States Court of Appeals, Tenth Circuit, January 24, 1966. Robert B. Cartwright, Clerk.)

Sam A. Crow (J. A. Dickinson, Ralph Skoog and Bill G. Honeyman on the brief) for Appellants;

Roger P. Marquis, Attorney, Department of Justice, (Edwin L. Weisl, Jr., Assistant Attorney General, Newell A. George, United States Attorney, and Elmer Hoge, Assistant United States Attorney, on the brief) for Appellees.

Before PICKETT, LEWIS and HILL, United States Circuit Judges.

HILL, Circuit Judge.

This action represents a second effort of the appellants to interject the Federal courts into a tribal dispute over what Indians are eligible to receive part of a $3,209,217.00 award payable by Congress to the Prairie Band of the Pottawatomie Tribe of Indians. The money awarded was based on an earlier Indian Claims Commission judgment granting the tribe in question further compensation for land taken by the government in the nineteenth century. In addition to a declaration of their rights, the appellants seek injunctive relief against the appellees to prevent them from further determining who is eligible to receive the fund and from distributing any money thereto.

Appellants' first attempt to invoke Federal jurisdiction into this issue met with complete failure when this court in Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767, held that there was no jurisdiction of this type of action either under 28 U.S.C., § 1353 or 28 U.S.C., § 1331 and furthermore that in essence the action was a private civil dispute between Indians of the same Tribe and Band concerning the distribution of proceeds of a sum of money. As Chief Judge Murrah said in that opinion, at page 770, "It is an intra-tribal controversy, over which Federal court jurisdiction has been traditionally denied." However, during the pendency of the appeal in that case, Congress enacted 28 U.S.C., § 1361, which the appellants then raised to support jurisdiction on appeal for the first time. The court there refused to consider that statute but indicated it could be raised anew in a trial court. The appellants did just that and raised 28 U.S.C., § 1361 in the court below which held that it did not have jurisdiction of the subject matter nor to grant the relief in question

and that the appellants did not have standing to raise the issue and further that the Tribe and the United States are indispensable parties and cannot be joined without the consent of Congress. From that judgment, the appellants have perfected their appeal here once again.

The pertinent facts to this dispute are sufficiently set forth in the previous opinion, Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, supra. Suffice it to say here that the Prairie Band of the Pottawatomie Tribe is authorized by Congress to receive a sizable sum of money based upon an Indian Claims Commission Award. That award stated, "* * * the petitioner Pottawatomi Nation, as created by the treaty of June 5, 17, 1846, and as it then existed, is entitled to an award for the benefit of all descendants of said Nation as it was constituted and recognized by the United States in said treaty, * * *." Then in appropriating the money to satisfy the award Congress said the fund, "* * * may be advanced or expended for any purpose that is authorized by the respective tribal governing bodies and approved by the Secretary of the Interior." See Act of September 6, 1961, 75 Stat. 474.

By appropriate resolutions, the General Council of the tribe authorized the business committee to establish the roll for the distribution of the appropriation. Thereafter in accordance with the above, a tribal membership roll was prepared indicating it "shall consist of the original allottees of the Prairie Band of Potawatomie Indians of Kansas living as of midnight December 1, 1960, and the descendants by blood of all original allottees of the Prairie Band of Potawatomie Indians living as of midnight December 1, 1960 * * *." The resolution also provided that in any person not placed on the membership roll may appeal the tribe's decision to the Secretary of Interior. Furthermore, any person claiming membership rights in the tribe may file

a protest concerning the inclusion of any other person on the roll with the Secretary of Interior which protest will be promptly determined by the Secretary.

Under the provisions of 25 U.S.C. § 163,[1] the Secretary of Interior has approved this resolution concerning creation of a tribal membership roll. From the pleadings it appears that the appellants have filed a written protest against the inclusion on the proposed roll of approximately 2,101 names. So far as we are aware, the roll of individuals who are to receive the benefits of the award has not yet been completed. In fact the Secretary stated in the answer to the written interrogatories that the final determination on eligibility has been suspended pending a final decision here. Preparatory work has progressed through the protest filing stage where it remains at this time.

Appellants' objection to the proposed plan of distribution is on the ground that the allottees mentioned and their descendants are not part of the identifiable group of Indians who constituted the Pottawatomie Nation and their descendants as it was recognized in 1846. Apparently they wish to restrict the award only to those descendants of the Tribe as it existed at the time of the treaty of 1846. According to appellants, if the procedure

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1. 25 U.S.C. § 163 provides:
"Roll of membership of Indian tribes
The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood: *Provided*: That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin. June 30, 1919, c. 4, § 1, 41 Stat. 9."

now sanctioned by the Secretary of Interior is followed, many people will benefit from the distribution who are not entitled to do so which will cause appellants irreparable damage.

Appellants are not representing the tribe to which they belong. They only appear individually as members of the tribe and as the Tribal Councilors and Tribal Claims Committee. Furthermore, they pursue their cause here notwithstanding an earlier opinion of this court which stated unequivocally that there is no federal jurisdiction to settle intra-tribal controversies which is exactly what this is. Also, insofar as the appellants' contention here involves a construction of the Indian Claims Commission judgment, that opinion declined to participate in such a decision, Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, supra. Apparently their sole hope of jurisdiction is 28 U.S.C. § 1361, although their prayer for relief hardly bears this out since § 1361 is a mandamus statute and the appellants seek injunctive relief and a declaratory determination of their rights.

28 U.S.C. § 1361 and § 1391(e) were enacted in 1962 and relate to mandamus against officers and employees of the federal government. Prior to this act, it was necessary to pursue such a cause of action only in the District of Columbia. Now, however, such action may be brought throughout the United States in any District Court.[2] It is clear that the Act did not enlarge the scope of mandamus relief.[3]

Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear

2. See Sen. Rept. # 1992, 87th Cong., 2nd Sess. (1962).
3. Smith v. United States, 333 F.2d 70.

that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. Huddleston v. Dwyer, 10 Cir., 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex Rel, Kadrie, 281 U.S. 206.

We have searched the record and the applicable law in an effort to ascertain a specific duty owed by the appellees to the appellants but have found none. The original Indian Claims Commission Award merely said the fund was for the benefit of all descendants of the Nation as it existed in the Treaty of 1846. In appropriating the money to satisfy this award, the Congress merely stated the money could be used for any purpose authorized by the tribal governing body and approved by the Secretary. Certainly it cannot be seriously argued that giving the Secretary authority to approve tribal action is a specific ministerial duty owed individually to the tribal members. Far from being ministerial, mere approval authority with nothing more appears highly discretionary.

The only statutory provision applicable is 25 U.S.C. § 163, supra, Note 1. But this certainly does not place a ministerial duty upon the Secretary which he owes to the individual members of the tribe. In fact it specifically recites that the Secretary may in his discretion authorize a membership roll to be made of a tribe and this he has authorized to be done. The second clause of the section then grants the Secretary approval authority on the roll after it has been made which the facts show has not as yet been completed due in large part to the present action. Once again, we fail to see how approval authority can be classified as a pure ministerial function. Based upon this, we must conclude that 28 U.S.C. § 1361 does not provide the appellants with jurisdiction of this case.

Though unique because of its relationship to an Indian Tribe, the suit is merely a private one concerning tribal membership and the courts have consistently refused to interfere in such a matter. Martinez v. Southern Ute Tribe of Southern Ute Res., 10 Cir., 249 F.2d 915. Appellants must utilize the procedure adopted by the tribe and approved by the Secretary for protesting the proposed membership roll.

Because of our disposition, we need not decide whether or not the Tribe and the United States are indispensable parties.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 290

PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time:

The judgment of the court of appeals was entered on January 24, 1966 (Pet. App. C). On April 22, 1966, Mr. Justice White extended the time for filing a petition for a writ of certiorari to June 21, 1966 and

on June 22, 1966, Mr. Justice White signed an order further extending the time to June 23, 1966. The petition was RECEIVED on June 23, 1966, but the certified record required by Rule 21 of the Rules of this Court was not filed, and the case not docketed, until June 24, 1966—one hundred and fifty-one days after the court of appeals' judgment.

Rule 22(3) of the Rules of this Court provides that "[a] petition for a writ of certiorari in [civil] cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law." Section 2101(c) of Title 28 of the United States Code provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

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